# No. 13942

# United States Court of Appeals

## FOR THE NINTH CIRCUIT.

CHARLES SIMON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

## BRIEF FOR APPELLANT

**Appeal from the United States District Court for the Southern District of California, Central Division.**

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### JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [4-6][1] The district court made no specific findings of fact. These

[1] **Numbers appearing in "brackets" herein refer to pages of the printed Transcript of Record filed herein.**

were waived. [8-9] The court stated no reasons for the judgment rendered. [41-42] The trial court found the appellant guilty. [41-42] Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [6-7]

## STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. It was alleged that after appellant registered and was classified he was ordered to report for induction. It is then alleged that on or about July 31, 1952, appellant "knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [4]

Appellant pleaded not guilty and waived the right of trial by jury. Findings of fact and conclusions of law were also waived. [8-9]

Appellant subpoenaed the production of the secret FBI investigative report made pursuant to Section 6(j) of the act. The Government produced the FBI report at the trial. It was offered into evidence. It was excluded on objection from the Government. The court examined it *in camera,* found it to be material and sustained the privileges by the Attorney General under Order No. 3229. [30-38, 39] At the close of the evidence the motion for judgment of acquittal was made. [10-12, 39-40] The motion for judgment of acquittal was denied. [41-42] Appellant was found guilty. [41-42] He was sentenced to serve a period of four years in the custody of the Attorney General. [4-6] Notice of appeal was timely filed. [6-7] The transcript of the record (including statement of points relied upon) has been timely filed in this Court.

## THE FACTS

Charles Simon was born on August 16, 1931. (1)[2] He registered with his local board on August 18, 1949. (2) The board mailed a classification questionnaire to him. (3)

The questionnaire was properly filled out by Simon and filed with the local board. (4) He showed his name and address. (5) In answer to one of the questions appearing in Series VI, he said that he did not regularly serve as a minister. (6) He stated that he was a minister of Jehovah's Witnesses and of the Watchtower Bible and Tract Society. He said that he had been such since June 13, 1939. He said that he was ordained on August 20, 1940, at Elkhart, Indiana. (6)

Simon also stated that he was a full-time college student. He showed that he was going to the Compton Junior College. (7, 9) He said that he was majoring in printing and art. (9) He said that he expected to get a diploma and degree in February, 1953. (9)

Appellant signed Series XIV. In this section of the questionnaire he asked the local board to send to him the special form for conscientious objector because he was conscientiously opposed to participation to war in any form. (10) At the conclusion of the questionnaire he claimed classification in Class IV-E. (10)

In the questionnaire he also referred to attached statements supporting his position as a conscientious objector. He signed the questionnaire in the manner required by law. (10)

In the letter referred to in the questionnaire he stated he was asking for the conscientious objector classification of Class IV-E. (12-13) He said that he had been seriously studying the Bible at an early age and that he had been reared in the faith by his parents. He said that he relied

[2] **Numbers appearing in "parentheses" herein refer to pages of the draft board file that are written in longhand at the bottom of each page and circled.**

completely upon the Bible. He then explained extensively that God proposed to vindicate his name and prove the Devil to be a liar before all mankind. He said that because the life was in the blood he could not take blood. He emphasized that he relied on the Ten Commandments. (12)

He said that he was opposed to both combatant and noncombatant military service and that he had pledged his life to Jehovah God. He showed that his weapons of warfare were not carnal. He concluded with the statement that he was not making the claim in order to dodge the draft but because he placed God above man. (12)

The local board, on October 10, 1950, mailed to Simon a special form for conscientious objector. (11) He properly filled out the conscientious objector form and returned it to the local board. It was filed on October 8, 1950. (17) He signed Series I (B). (18)

He answered that he believed in the Supreme Being. He then described the nature of his beliefs showing that his beliefs were deep-seated and that they involved duties to God that were higher than those that he owed to the state. He showed that this belief had come about through serious study of the Bible. He referred to a separate paper. In this paper he quoted extensively the Scriptures. (20) He said that he was seeking God's kingdom first and that he was not seeking any kingdom of this world as a means of salvation.

He said that he was conscientiously opposed to participation in war in any form. He said that if he did he would be a friend of the world. He then added that to be a friend of the world was to be an enemy of God. (20-21) He then showed that he could not serve two masters. (21)

He was asked how it was that he came to get the opinions that he had as a conscientious objector. He said that he had these opinions that obligated him to serve God since the age of nine. He added that he believed in the Supreme Being and that such was Jehovah God. He said that he had learned this through the study of the holy Bible together

with Watchtower publications that aided him in Bible study. (19)

In answer to the question as to whom he relied upon he said that he relied upon the Bible and the Watchtower for guidance. (19)

He answered that he did not believe in force or the use of force except under circumstances where Jehovah God permitted it. (19) He then stated that his service as a witness of Jehovah explaining to others about God's kingdom conspicuously demonstrated the consistency and depth of his conviction as a conscientious objector. (19)

Simon then listed the schools that he had attended. He did not list any employers. He merely added that he had been a part-time clerk. (19) He gave the list of the addresses where he had lived. (23) He named his parents. He then added that each was a Jehovah's Witness. (23) He said that he had never been a member of a military organization. (23).

He said that he was a member of a religious organization. He pointed out that the Watchtower Bible and Tract Society was the legal governing body of Jehovah's Witnesses, the group to which he belonged. (23) He said that he became a member of that organization in 1939 by and through home Bible study. (23) He listed the church located at Compton, California, that he had attended. He showed that Mr. Lyon was the presiding minister of the church. (23)

Simon then referred to a clipping from the *Watchtower* magazine for a description of the nature of the beliefs of the organization on opposition to war. (23) He then referred to the attached *Watchtower*. (22) In this he had underscored the following: "For this neutral position toward the deadly conflicts of this old world and for their Christian devotion and allegiance to God's New World government by his Son Jehovah's Witnesses are hated by all nations and suffer persecution at the hands of the religious friends of the old world." (22)

Simon listed a number of persons as references. He then signed the conscientious objector form. (24) He attached a certificate by Glenn Mounce, showing that he attended regularly the meetings of Jehovah's Witnesses and engaged in the house-to-house preaching work of Jehovah's Witnesses. (25) Robert Merriott, Sam Cook, H. B. Robbins, and E. R. Vanice also signed certificates that were attached to the special form for conscientious objector. (26-30)

The local board, on October 26, 1950, classified Simon in Class I-A. He was notified of this classification. (11) He wrote a letter to the board reminding it of his claim for classification as a conscientious objector. In this he requested a personal appearance. (11) This was filed with the local board. (11)

Simon then filed with the local board a letter from the dean showing that he was a full-time student at the Compton Junior College. (11)

On December 8, 1950, he was notified to appear on December 13, 1950. (11, 35) On that date he appeared. A memorandum was made. (11, 36)

Simon testified about his personal appearance. [13-26] He said that he went to the board for the purpose of discussing his classification. He wanted to show to the board the meaning to him and the importance of the obligation that was imposed upon him by certain scriptures that he had cited in his papers. He wanted to discuss this. (13-14) He tried to discuss this material but was not permitted to do so. (14) He told the board at the hearing that the basis of his conscientious objection was home training. He opened his Bible and tried to give evidence as to why he could not participate in war. The board said that it was unnecessary for him to do this. They said that they "were not interested in what I believed." [21]

The local board informed him that that would be all and that he would receive notice of their decision after the hearing. [22]

He testified that he attempted to read but was denied

the opportunity to read aloud to the board. [24] He said that he was prepared to give them information to "impress on their minds the importance of these scriptures" that he had already put in his file and also that he was prepared to explain what "they may have overlooked." He wanted to show the importance and explain things if they had "misunderstood what my feelings were." [25] He said when he attempted to do this he was cut short and denied the right to explain or discuss these things with the board. [26]

The memorandum of the local board merely showed that Simon said "it is against his belief" to go into the armed services. The memorandum then stated that it was the unanimous opinion of the board that he be "continued in Class I-A." (36)

Simon filed a letter with the local board upon the personal appearance. It was in writing. He showed in this that his undivided allegiance belonged to Jehovah God. (37) He said that if the law of man conflicted with the law of God that God's law was to him supreme. (37) He showed that all nations of the world were defiled but that God's nation or kingdom was clean. (37) He indicated that he believed the law of God forbade him to shed blood and that if he were to kill he would be killed by God. (37) He said that he would not conform to the world. He showed that he would have to devote his life to God until death, because his life belonged to God and he had to be pleasing to God. (38)

Appellant, on December 19, 1950, wrote a letter to the local board appealing his classification. (40) This was filed with the board. He was then ordered to take a preinduction physical examination and he was found acceptable for military service. (11, 43) His file was forwarded to the board of appeal. (11, 44) The appeal board made a preliminary determination that he was not entitled to the conscientious objector classification. (11) This entry in the minutes caused the file to be forwarded to the Department of Justice. (49) The Department of Justice received the file on November 5, 1951.

After the file was received by the Department of Justice there was an investigation conducted by the FBI on the sincerity of Simon's conscientious objections. The Department of Justice made a report following the completion of the investigation. This report was sent to the district attorney. The district attorney then forwarded it to the hearing officer of the Department of Justice. The hearing officer used the report of the Department of Justice when Simon appeared before him at the hearing. [31-32]

Simon wrote a letter to the hearing officer when he received notice from the hearing officer that he was entitled to unfavorable evidence. [26] The hearing officer wrote Simon a letter and told him that the unfavorable evidence would be made available to him at the hearing. [26-27] Simon went to the hearing and all the time was expecting to have the adverse evidence called to his attention as the hearing officer had told him. The hearing officer, however, did not inform him of any of the unfavorable evidence in the secret investigative report of the FBI. [37] Simon said that the hearing officer had written him that he would make it available to him, and Simon said, "I expected that he would, but the information was not presented to me." [26-27]

Simon said that at the hearing he did not ask for the adverse evidence orally, because he had previously done this by letter and that the hearing officer had answered by letter that it would be given at the hearing. [30]

The hearing officer, on March 11, 1952, made his report to the Department of Justice. It was very brief. He found that Simon had attended Compton Junior College one year. He said that Simon worked on Sunday when it was necessary. He believed that he had a right to protect his mother and brother by force, if necessary, and that if he did he would be forgiven by God. He found Simon believed in God's law being superior to man's law. The hearing officer then recommended that Simon should be "placed in noncombatant service to wit, classed as I-A-O." (54)

The report of the hearing officer was sent to Washington.

The Special Assistant to the Attorney General wrote a letter to the appeal board adopting the report and recommendation of the hearing officer. He found that Simon should be placed in Class I-A-O and made liable for noncombatant military service in the armed forces. (50) The appeal board classified Simon in Class I-A-O and notified him of it. (11) He was ordered to report for induction on July 31, 1952. (11, 58) Simon reported at the induction station and refused to be inducted. (62)

## QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that appellant possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He showed that his obligations to the Supreme Being were superior to those owed to the Government. He showed that his beliefs were not the result of political, philosophical, or sociological views but that they were based solely on the Word of God. (17-24)

The local board placed him in Class I-A. (11) Following personal appearance he was continued in Class I-A. (11) On appeal following an investigation and hearing in the Department of Justice he was placed in Class I-A-O (11) A secret investigation was conducted by the FBI and a report thereof placed in the hands of the hearing officer. [31-33] (52)

Simon was called for a hearing. After the hearing the hearing officer recommended that he be classified as a conscientious objector, qualified to do limited military service as a noncombatant soldier. (54) The Department of Justice followed the recommendation that was submitted to the appeal board. (50) The appeal board classified Simon in Class I-A-O. (11)

In the motion for judgment of acquittal it was contended

that the classification was without basis in fact and that it was arbitrary and capricious. [10] It was also contended that the recommendation and report of the hearing officer to the Department of Justice was illegal. [11] The motion was renewed at the close of the case and denied. [39, 41-42]

The question presented here, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the recommendation of the hearing officer, adopted by the Department of Justice, and the classification given to appellant by the appeal board were arbitrary, capricious, illegal and without basis in fact.

II.

Simon was granted a personal appearance. (11, 35) He appeared and attempted to give testimony. He wanted to explain how his conscience was molded by the Scriptures and what they meant to him as a conscientious objector to the performance of military service. He attempted to quote and read from the Bible in support of his conscientious objection. The local board members cut him off and stated that they were not interested in what he believed. [13, 14, 21, 25] The local board cut him short when he attempted to discuss the depth of his convictions and the consistency of his life as a conscientious objector. [26]

In the motion for judgment of acquittal it was contended that Simon was denied the right to discuss his classification and that he was cut off from exercising his rights upon personal appearance by the local board. [39-40] The motion for judgment of acquittal was denied. [41-42]

The question presented here, therefore, is whether Simon was denied the right to a full and fair hearing upon personal appearance and not permitted to exercise the rights guaranteed to him by Section 1624.2(b) of the Selective Service Regulations.

III.

The conscientious objector claim of appellant was referred to the Department of Justice for appropriate inquiry and hearing. (52) A complete investigation was made by the FBI before the case was referred to the Department of Justice for a hearing. (52) [31-32]

At the hearing the hearing officer had the secret FBI investigative report before him and used it in making his recommendation to the Department of Justice. [31-32]

Before the hearing Simon wrote a letter to the hearing officer for the adverse information or evidence that he had against him. [26] The hearing officer wrote Simon a letter and told him that he would make available the adverse information that he had when he had his hearing. [26-27]

At the hearing the officer did not advise Simon of any adverse evidence or information, as he had promised to do in his letter. [37]

At the trial appellant subpoenaed the FBI report. The Government supplied the FBI report to the court but objected to its being received into evidence. [30-32, 33] Objection was made to the introduction of the FBI report when it was offered by the appellant. [33] The trial court found the FBI report to be relevant, but excluded it on the grounds that it was confidential and that its exclusion was commanded by Order No. 3229 of the Attorney General. [33-34]

It was stipulated that the appellant sent a request for such information by letter to the hearing officer before the hearing. [34] It was further stipulated that the appellant was entitled to receive from the hearing officer, before the commencement of the hearing, adverse evidence and that none was given to him upon the occasion of the hearing. [35] The appellant was denied the right to use the FBI report to determine whether or not the hearing officer had given him a fair and adequate summary of the adverse information appearing in the secret investigative report of the FBI.

The question presented here, therefore, is whether appellant was denied the right to have and to use the FBI

report upon the trial to test and to determine whether or not the summary made by the hearing officer was a full and fair and adequate summary as required by the due process clause of the Fifth Amendment, the act and the regulations.

## SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and entering a judgment of guilt against him.

III.

The district court committed reversible error in refusing the appellant the right to use the secret FBI investigative report at the trial as evidence to determine whether the summary of the adverse evidence given to the appellant by the hearing officer of the Department of Justice was fair and adequate as required by due process of law, the act and the regulations.

## SUMMARY OF ARGUMENT

### POINT ONE

**The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O.**

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious

training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God superior to those of the state. The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses. The board of appeal, notwithstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*United States* v. *Alvies,* 112 F. Supp. 618; *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Pekarski,* — F. 2d — (2d Cir. Oct. 23, 1953); *Taffs* v. *United States,* — F. 2d — (8th Cir. Dec. 7, 1953).

## POINT TWO

**The appellant was denied the right to a full and fair hearing upon the occasion of the personal appearance before the local board in that he was denied the right to discuss his classification and offer new and additional evidence to the board.**

Section 1624.2(b) of the Selective Service Regulations gave appellant the right to discuss his classification, point out parts of the file that he thought the board had overlooked and to offer new and additional evidence.

Simon, at his personal appearance, was cut off. The board denied him the right to discuss his ministerial status by reference to the Bible, which he relied upon as his authority. He wanted to prove his ordination to be the same as that which the Lord Jesus relied upon.

Simon was denied the right, therefore, to discuss his classification and give new and additional evidence upon his personal appearance. The conduct of the board was in violation of the regulations. He was denied due process of law.—*United States* v. *Laier,* 52 F. Supp. 392 (N. D. Calif. S. D.); *Davis* v. *United States,* 199 F. 2d 689 (6th Cir.); *Bejelis* v. *United States,* 206 F. 2d 354 (6th Cir. 1953).

Therefore the judgment ought to be reversed because the trial court erred in overruling the motion for judgment of acquittal containing this complaint concerning the denial of appellant's right to procedural due process of law.

## POINT THREE

**The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.**

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court

permitted the report to be marked for identification and received as a sealed exhibit after the trial court made an inspection of the exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The trial court committed grievous error when it refused to permit the exhibit to be used as evidence. It merely received the exhibit and permitted it to be marked for indentification, and the court alone inspected it. The court excluded it and permitted the exhibit to come before this Court in sealed form for the limited purpose of determining whether it was in error in excluding the exhibit.

No claim of privilege is applicable here. The Government waived its rights under the order of the Attorney General, No. 3229, when it chose to prosecute appellant in this case. The FBI report was found to be material by the trial court. The judicial responsibility imposed upon the trial court to determine whether a fair and just summary was required to be given to the appellant overcomes and outweighs the privilege of Order No. 3229 of the Attorney General.—See *United States* v. *Andolschek,* 142 F. 2d 503 (2d Cir.); *United States* v. *Krulewitch,* 145 F. 2d 87 (2d Cir.); *United States* v. *Beekman,* 155 F. 2d 580 (2d Cir.); *United States* v. *Cotton Valley Operators Committee,* 9 F. R. D. 719 (W. D. La. 1949).

The Government must be treated like any other legal person before the court. It has no special privileges, as the king did before the Stuart judges in England.—*Bank Line* v. *United States,* 163 F. 2d 133 (2d Cir.).

The secret investigative report was material. The trial court could not discard its judicial function in determining whether a full and adequate summary had been made of the secret investigative report without receiving the secret report into evidence and comparing it with the summary made by the hearing officer.—*United States* v. *Nugent,* 346 U. S. 1; *United States* v. *Evans,* 115 F. Supp. 340 (D. Conn. Aug. 20, 1953).

It is respectfully submitted, therefore, that the trial court committed error in excluding the FBI report from evidence and depriving appellant of the use of it upon the trial to ascertain whether the hearing officer made a full and fair summary of the secret FBI investigative report.

## ARGUMENT

### POINT ONE

**The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O.**

The question to be determined under this point is whether the denial of the conscientious objector status by the board of appeal is without basis in fact and whether the recommendation of the Department of Justice and the final classification are illegal, arbitrary and capricious. This point has been extensively argued in the briefs for appellants filed in the cases of *Batelaan* v. *United States,* No. 13,939, at pages 14-35, and *Francy* v. *United States,* No. 13,940, at pages 16-22, on the docket of this Court. Reference is here made to the arguments appearing in those cases at the pages above referred to. Especial attention is called to that part of the argument in the brief in the *Francy* case where the inconsistency of the I-A-O classification for the registrant claiming the I-O classification is made.—See pages 20-21 of the *Francy* brief for this particular discussion.

The denial of the conscientious objector status is without basis in fact and the I-A-O classification and the recommendations of the Department of Justice that it is based upon are illegal, arbitrary and capricious.

## POINT TWO

**The appellant was denied the right to a full and fair hearing upon the occasion of the personal appearance before the local board in that he was denied the right to discuss his classification and offer new and additional evidence to the board.**

Section 1624.2(b) of the Selective Service Regulations gave appellant the right to discuss his classification, point out parts of the file that he thought the board had overlooked and to offer new and additional evidence.

The testimony of Simon is undisputed that upon the occasion of his personal appearance he attempted to argue his ministerial status by citing and quoting from the Bible. His testimony was that the local board refused to allow him to testify or discuss his case. When he attempted to discuss his classification, point out facts in the file that the board had overlooked and submit new and additional evidence, he was stopped. He was denied the right to a full and fair hearing.

The Government failed to call the board members to contradict, or attempt to contradict appellant. It failed to ask the clerk any questions to dispute what appellant said. This makes the evidence undisputed. It has been held that the failure to call a witness available to the Government or to introduce evidence available to the Government gives rise to the presumption that the evidence would be adverse to the Government. The Supreme Court said it would be presumed that it would corroborate the testimony of the defendant in criminal proceedings. (See *United States* v. *Di Re,* 332 U. S. 581, at page 593.) It is indisputably established, therefore, that he was denied a full and fair hearing.

Section 1624.2(a) of the regulations provides that the registrant "shall have an opportunity to appear in person before the member or members of the local board designated for the purpose." 32 C. F. R. § 1624.1(a) (page 801)

Section 1624.2(b) of the regulations provides:

> "At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary."—32 C. F. R. § 1624.2(b) (pages 801-802).

Section 1624.2(b) provides that the local board "may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary." However, in this case the local board did not impose any time limitation. The board denied the registrant the right to discuss his classification.

It is true that the appellant told the board that he was prepared to discuss his case and give new and additional testimony. This did not in any way justify the board in cutting him off completely.

The board did not allow him to argue his case. They did not give him a chance to discuss his classification. They refused him the right to go through his file and point out information that he believed the board had overlooked or had not given sufficient weight. There was no hearing. Appellant appeared and stated that he was dissatisfied with his classification because he was a minister exempt from service, but that does not constitute a full and fair hearing. A full

hearing means a complete one. The appellant was denied this right. It was vital and important that the board give him a chance to argue his case. He did not get it. He was prejudiced and injured by the action of the board.

It cannot be said that the denial of the full and fair hearing is harmless error. The board may have granted to the appellant a proper classification or at least one that he would consider satisfactory. We cannot speculate over the failure and conclude that the classification would not have been changed had the board followed the regulations.

The cases are uniform that where a registrant has been denied a full and fair hearing upon a personal appearance there is a denial of procedural due process.—*Knox* v. *United States,* 200 F. 2d 398 (9th Cir. 1952); *Davis* v. *United States,* 199 F. 2d 689 (6th Cir. 1952); *Bejelis* v. *United States,* 206 F. 2d 354 (6th Cir. 1953).

In *United States* v. *Romano,* 105 F. Supp. 597 (S. D. N. Y. 1952), the defendant was acquitted because the local board denied the defendant's request for a personal appearance on the ground that he had previously had a hearing before the first classification. The court held that the regulations contemplated a personal appearance following classification so that the registrant could appear before the board, argue his classification and contest the ruling made by the local board. Judge Kaufman said:

> "I do not intend to lose myself in conjectures of what might have happened had defendant had his post-classification hearing for, indeed, this would be out of the realm of reasonableness. It is sufficient to the disposition of the case before me that I find as a matter of law that defendant was deprived of the right which belongs to every citizen, due process of law. . . .
>
> "Defendant here had absolutely no opportunity to argue his classification which Part 1624 provides him as a matter of law. Once being aware of the board's position after he had been classified

> I-A-O he had a right to appear, make a statement, and point out to the board where he believed they erred and what he believed they overlooked. It cannot be said that in dealing with a subject such as the religion of Jehovah's Witnesses, an oral dissertation might not be of aid to both registrant and the board. What subsequently happened to the various appeals in his case cannot, in the absence of this hearing, be taken to reflect a full and fair disposition of the case at every level of the Selective Service System. . . .
>
> "The thrust of 32 CFR 1624 is completely in the direction of post-classification hearings for all Selective Service registrants. I find that in being denied such a hearing, the defendant has been deprived of due process of law."

In *United States* v. *Laier,* 52 F. Supp. 392 (N. D. Calif. S. D. 1943), the defendant was acquitted because the local board refused a request for an opportunity to appear in person. In that case Judge St. Sure said:

> "From the above provisions it clearly appears that the registrant is entitled to a hearing as a matter of right. And it is settled law that such a personal hearing is a part of due process of law in such proceedings. . . .
>
> "It is also apparent that the application for an opportunity to be heard actually suspends the classification of the registrant, who after such hearing must be reclassified 'in the same manner as if he had never before been classified,' and that he may not be inducted until ten days after he receives the new notice of classification.
>
> "Admittedly, the local board failed to comply with those provisions, and the effect of such failure would seem to be that the registrant was not classified at all, nor could he legally be inducted, at the

time it made its order. In issuing its order, the board acted entirely outside its jurisdiction and without any legal authority.

"The Government further contends that the appeal by registrant to the Board of Appeal cured any error that the local board may have committed. It is urged that because the defendant furnished the appeal board with all the information that he might have presented at a hearing before the local board he was not prejudiced.

"The fact that the Board of Appeal sustained the classification made by the local board in no way lent legality to its erroneous procedure. Defendant was entitled under the Regulations and as part of due process of law to make a personal appearance. As well might it be said that an accused who was incarcerated during a criminal trial but permitted to submit a written statement of his case to the jury was not prejudiced by the denial of his right to personally appear in court and present his case."

Another case in point is *United States* v. *Peterson,* 53 F. Supp. 760 (N. D. Cal. S. D. 1944). In that case the defendant appeared for the personal appearance. The board members made him wait on the outside of the conference room of the board. The board then reviewed his file and reconsidered his case while the registrant was sitting on the outside. He was deprived of the right to discuss his classification or point out things in the file that he wanted to call to the attention of the board. In granting the motion to dismiss the court said:

"The Government argues that the facts in this case differ from those in the *Laier* case because in the *Laier* case the request for personal appearance was denied, but here the board actually discussed defendant's classification while he waited in an

> outer office. Such discussion out of the presence of registrant did not constitute substantial compliance with the regulation permitting a personal appearance. . . . The further argument is made that defendant waived his original request for an appearance because of his failure to insist on it, and because of the clerk's testimony that when she gave him the board's message he appeared satisfied. It was not defendant's duty to insist on his right to appear. It was the duty of the board, if he made a proper request (which is undisputed), to grant him a hearing; and if it did not do so it was acting outside the scope and contrary to the terms of the Act and Regulations."

Judge St. Sure then ordered the defendant dismissed, stating:

> "The motion taken by the local board was not within the framework of the Act set up to protect the registrant, for it was without authority to classify a registrant who requested a personal hearing, without granting him such hearing." —*United States* v. *Peterson,* 53 F. Supp. 760.

It has been held that if there is no hearing, if the evidence is not considered or if the registrant is not given the right to discuss his case, it constitutes a denial of due process of law so as to make invalid the draft board proceedings. (Ex Parte *Stanziale,* 138 F. 2d 312 (3rd Cir.)) If the registrant is not given this right his constitutional liberties are violated. (Compare *United States* v. *Stiles,* 169 F. 2d 455 (3rd Cir.)) The steps to be taken as a condition precedent to induction must be strictly followed. Otherwise the order to report is void. (See *Ver Mehren* v. *Sirmyer,* 36 F. 2d 876 (8th Cir.) "There must be a full and fair compliance with the provisions of the Act and the applicable regulations."—*United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir.).

It is respectfully submitted that this Court should conclude that the draft board proceedings in this case are void because appellant was denied the right to a full and fair hearing upon his personal appearance. The trial court, therefore, committed error in overruling the motion for judgment of acquittal. The judgment of the court below ought, therefore, to be reversed with directions to enter a judgment of acquittal.

## POINT THREE

**The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.**

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the report to be marked for identification and received as a sealed exhibit after the trial court made an inspection of the exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The above point raised in this case is identical in every way to Point Two that is briefed and argued in the case of *Batelaan* v. *United States,* No. 13,939, the case that is a companion to this one. All of the argument made in the brief for *Batelaan* in that case at pages 12 to 13 and pages 36 to 47, applies here. It is hereby adopted and made a part hereof as though copied at length herein. Because these two cases are companion cases and identical in every respect, the Court is hereby requested to read and consider the argument made in the *Batelaan* case that is applicable here.

It is respectfully submitted, therefore, that the trial court committed grievous error in excluding the FBI report in this case. The error was prejudicial to the appellant. The

court should reverse the case and order it remanded so that the appellant can have a full and fair hearing in the trial court as to whether or not there was a fair and adequate summary of the secret FBI investigative report made to Simon at the hearing or whether such summary should have been made by the hearing officer when Simon requested it at the hearing. For this reason the case ought to be reversed and remanded for a new trial.

## CONCLUSION

Wherefore the appellant prays that the judgment of the court below be reversed and the court ordered to enter a judgment of acquittal; or, in the alternative, appellant prays that the judgment be reversed and the cause remanded for a new trial.

Respectfully submitted,

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